Filed 10/27/09 P. v. Vega CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JORGE HUMBERTO VEGA, Defendant and Appellant.	B209081 (Los Angeles County Super. Ct. No. BA317875)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Affirmed.

Nancy J. Mazza for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Joseph P. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Humberto Vega appeals from the judgment entered following a jury trial which resulted in his conviction of four counts of second degree robbery (Pen. Code, § 211),[1] during the commission of each of which he personally used a firearm (§ 12022.53, subd. (b)); two counts of attempted second degree robbery (§§ 664/211), during each of which he personally used a firearm (§ 12022.53, subd. (b)); one count of assault, during which he personally used a firearm (§§ 245, subd. (a)(2), 12022.5, subd. (a)) and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)); and the trial court's findings he previously had suffered convictions for two serious felonies within the meaning of section 667, subdivision (a)(1) and the Three Strikes law (§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court sentenced Vega to an aggregate term of 25 years to life plus 20 years in prison. We affirm the judgment.[2]

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*.

a. *The robbery of Jun – count 1*.

At approximately 8:00 p.m. on February 24, 2007, Sung Do Jun was standing in front of the building at 5426 Barton Avenue, near Western Avenue. Jun lives in one of the apartments there. He was waiting for his son, with whom he was going to have dinner.

Jun felt someone touch him on the shoulder and he turned to see a man "pull[ing] out a gun." The man, who Jun later identified as Vega, held the small black gun at approximately waist height and pointed slightly downward. A second man then came around from behind Jun and, while Vega continued to point the gun, went through Jun's pockets. The man took from Jun approximately $400 in cash, an "I-Pod," a cellular telephone, and Jun's identification. Jun was "terrified" the entire time.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Vega was tried with a co-defendant, Olman Pineda, who is not a party to this appeal.

At one point, Vega began looking around Jun's car. The keys were in the car and the engine was running. At the same time, the man going through Jun's pockets backed up a bit. Jun took this opportunity to run from the two men, through the gate to the building and into his apartment. Jun did not look behind him to see if either of the two men were following him. He just ran, yelling the word " 'Police' " as he did so.

Approximately two hours later, police officers contacted Jun and asked him to come to a specific location to determine whether two men who had been detained were the same two men who had robbed him. Police officers transported Jun to the location where he identified Vega and his co-defendant, Pineda, as the men who had robbed him earlier that evening. At trial, Jun again identified Vega as one of the robbers.

b. *The assault with a firearm of Budkowski – count 2.*

At approximately 9:45 p.m. on February 24, 2007, Daemon Budkowski and a friend, Jessica Burton, were walking toward Burton's car which was parked near 7th Street and Wilton. As the two were walking across the street, a dark colored Nissan Maxima slowed down and parked nearby.

Burton got into the passenger seat of her car and closed the door. Budkowski got into the driver's seat and, before he could close the door, Vega approached him and grabbed him by his jacket in an effort to pull him from the car. Budkowski "slammed the door—like [he] didn't know what was going on." Budkowski slammed the door against Vega's arm four or five times. Each time Budkowski attempted to close the door, Vega would "bounce" on the door. It was at that time that Budkowski saw that Vega was holding a gun in his other hand. Vega did not point the gun directly at Budkowski; he "didn't have time to do so." Neither did Vega say anything to Budkowski. However, each time Budkowski attempted to close the car door, Vega would "bounc[e] on the door and . . . the gun would hit . . . the window." Vega finally let go of Budkowski's jacket and ran to the dark colored Nissan Maxima, which was parked immediately in front of Burton's car. The Nissan then "took off."

Budkowski wanted to follow the car, but each time he put the car in gear to drive, Burton put on the emergency brake. When Budkowski removed the emergency brake, Burton put the car in park.

During the incident, Budkowski did not think that his life was in danger. He was "just really upset at the time." He wasn't really thinking; he was responding instinctively. Budkowski believed he was "in shock." Throughout the incident, Burton had been screaming.

At trial, Budkowski testified that he was "about 50 percent" certain Vega was the man who had attacked him.

During the incident, Burton could see that Vega had a gun in his hand and she was "really scared." When she saw the gun "it terrified [her] because [she] didn't know what was going to happen." Later that night, Burton was transported to a place where Vega and Pineda were being detained. Burton identified Vega and indicated she was "positive" Vega was the man who had been holding a gun. At trial, Burton again identified Vega as the man who had had a gun in his hand while trying to pull Budkowski from the car.

c. *The robbery of Stephenson – count 3.*

At approximately 10:30 p.m. on February 24, 2007, David Aron Stephenson was walking on Melrose, just west of Western when Vega stepped out from behind a tree and approached him. Vega pointed a small, black, handgun at Stephenson, then asked Stephenson for his money. Stephenson took his wallet from his back pocket and handed it to Vega. After rifling through Stephenson's wallet, Vega tossed everything he did not want onto the ground. Vega then asked Stephenson for his backpack. After dropping a few items to the ground, Vega took the backpack, turned around, walked about 10 feet to a waiting black sedan and got into the passenger side. The car then pulled a U-turn and drove off. As it drove away, Stephenson saw the license plate number on the car and committed it to memory.

During the incident, Stephenson was "very scared." After Vega and Pineda left the area, Stephenson went to a nearby pay phone and telephoned police. He gave them the license plate number of the car the two robbers were driving. Approximately 15 minutes later, police officers arrived and transported Stephenson to a place where Vega was being detained. Stephenson positively identified Vega as the man who had robbed him. At trial, Stephenson again identified Vega as the robber.

d. *The robberies of Linares, Garcia and Martinez – counts 4, 5 and 6.*

Between 8:30 and 9:00 p.m. on February 24, 2007, Nehemias Linares and two friends, Juan Garcia and Jesus Martinez, were walking near the intersection of Lockwood and Madison Streets when a black Nissan sedan stopped nearby. Two men got out of the car. Vega, who had been riding in the passenger seat, was carrying a black, semiautomatic pistol. Vega and Pineda approached the three men and told them to put their hands on a railing. Vega and Pineda then told each of the three men to lift up his shirt. During this time, Vega was pointing the gun at the three men with his arm outstretched. Linares believed his life was in danger.

Pineda approached the three men and took each man's wallet from his pocket. After taking the wallets, Vega and Pineda got back into the Nissan sedan. Vega got into the passenger's seat and Pineda got into the driver's seat. The two then drove off. One of Linares's friends used his cellular telephone to call the police. The three men then got into a car and followed Vega and Pineda as they drove north on Lockwood. Linares and his friends followed Vega and Pineda as they drove from Lockwood to Hoover, then to Beverly and onto Virgil. At Virgil and Clinton streets, Linares saw the gun being tossed from the passenger's side of the sedan. The chase ended farther up Virgil when police officers arrived.

At the scene, Linares, Garcia and Martinez were separated. Each man was then asked if Vega and Pineda were the men who had robbed them. Linares identified Vega as one of the two robbers. At trial, Linares stated he had no doubt Vega was one of the two men who had robbed him.

e. *Vegas's arrest.*

On February 24, 2007, Los Angeles Police Officer Ramon Romero and his partner, Officer Hulsebus, were on patrol when they received a call reporting a robbery. The radio report gave to the officers the general vicinity of the robbery and the license plate number of the car being driven by the robbers. Romero and his partner went to the area and spotted the car with the reported license plate number. The officers "got behind the vehicle" and followed it as it drove southbound on Hoover. Romero called for "backup" and an "airship," and, in the meantime, continued to follow the black sedan. After the sedan turned onto Virgil and as it was traveling underneath the 101 Freeway, Romero observed the passenger in the car "toss a black item outside the passenger side window." Romero radioed one of the police units which was traveling behind it to "secure" the item, which turned out to be a small black handgun.

The black sedan continued on until it came to the intersection with Clinton Street. There, after running a red light, the car stopped abruptly. The passenger, Vega, got out of the car and ran east, through a residential neighborhood. The police helicopter followed Vega, while Officers Romero and Hulsebus stayed with the car and detained Pineda. As Vega ran, he discarded two cell phones and removed his jacket. At trial, Officer Romero identified Vega as the individual who ran from the car. A search of the car revealed Stephenson's backpack.

On the evening of February 24, 2007, Los Angeles Police Officer Matthew Zeigler received a radio message indicating that units were needed to respond to the area around the intersection of Virgil and Clinton Streets. Zeigler and other officers had been informed that a suspect might be hiding in a backyard nearby. Zeigler and his partner got out of their police car and, while following the light from the helicopter, began jumping fences in and out of backyards. The officers ultimately found Vega underneath a panel truck in the back parking lot of an apartment building. Zeigler and his partner pulled Vega out from under the truck and transported him back to the intersection of Virgil and Clinton. At trial, Zeigler identified Vega as the man he had found under the truck.

Both Vega and Pineda were transported to the Rampart Police station. While there, Vega complained that his "right elbow was hurting or in pain."

At approximately 2:00 a.m. on February 25, 2007, Los Angeles Police Detective Gilbert Alonso interviewed Pineda. Pineda indicated that on the evening of February 24, he had parked his dark blue Nissan near a white van, had gotten out of the car and approached an Asian man from behind. With regard to the "incident involving a male and a female," Pineda stated that he drove his car to the scene. While he was there, he heard a female screaming. Pineda was also present when Vega took Stephenson's backpack and when the three Hispanic men were robbed. During the latter incident, Pineda had gotten out of his car and, with Vega, had approached the three men.

f. *Defense evidence.*

Charles Flippo is a "criminal defense investigator." At defense counsel's request, Flippo went to see Vega in the lockup. There, he had Vega write on a piece of paper. Vega used his right hand to print the first line and handwrite on the second line. On the third and fourth lines Vega used his left hand to write out an exemplar. When Flippo examined Vega's hands, he noted a callous on Vega's right middle finger. When Vega held a writing implement in his right hand, it touched the callous. No such callous appeared on Vega's left hand.

2. *Procedural history*

In an amended information filed on October 12, 2007, Vega was charged with four counts of second degree robbery, during each of which he personally used a firearm (§§ 211, 12022.53, subd. (b)); one count of assault with a firearm, during which he personally used a firearm (§§ 245, subd. (a)(2), 12022.5, subd. (a)); two counts of attempted robbery, during each of which he personally used a firearm (§§ 664/211, 12022.53, subd. (b)); and one count of being a felon in possession of a firearm (§ 12021, subd. (a)(1)). It was further alleged as to each count that Vega previously had been convicted of two serious felonies within the meaning of section 667, subdivision (a)(1) and the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). Vega pleaded

not guilty to each of the charges and denied having been convicted of the alleged prior felonies.

Trial was by jury. At the close of the People's case, Vega made a motion for entry of a judgment of acquittal for insufficient evidence (§ 1118.1). The trial court denied the motion.

The jury found Vega guilty of all of the substantive offenses and found true each of the allegations that he had personally used a firearm. In a bifurcated proceeding, the trial court found the alleged prior convictions to be true.

The trial court sentenced Vega to 25 years to life plus 20 years in prison. Vega filed a timely notice of appeal.

CONTENTIONS

Vega contends: (1) "[t]he trial court erred in denying [his] motion [made] pursuant to . . . section 1118.1 to dismiss the assault with [a] firearm count involving Daemon Budkowski;" (2) "[t]he prosecutor's trial strategy of demanding a joint trial and use of [his] co-defendant's confession in violation of *Aranda* protections and the trial court's approval of the strategy without careful consideration of *Aranda's* unintended consequences denied [him] a fair trial;" (3) "[t]he sentencing court abused its discretion in failing to strike one prior conviction on count 1 in order to avoid the harsh life sentence [imposed] pursuant to the Three Strikes law;" and (4) "[t]he sentencing court denied [him] a fair hearing when the court refused to hear mitigating information solely to expedite the hearing."

DISCUSSION

1. *The trial court properly exercised its discretion when it denied Vega's section 1118.1 motion with regard to the count alleging the assault with a firearm of Budkowski*.

At the close of the prosecution's case, Vega moved for acquittal of the charge of assault with a firearm of Budkowski as there was insufficient evidence to support the allegation. Vega asserted there is insufficient evidence he committed an act *with a firearm* that, by its nature, would directly and probably result in the application of force

to a person. Accordingly, he argued the trial court erred when it denied his motion for dismissal of the charge pursuant to section 1118.1.

Section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses on appeal." "The test applied by the trial court in ruling on a motion for acquittal is the same test applied by the appellate court in reviewing a conviction for sufficiency of the evidence, namely, to determine whether from the evidence then in the record, including reasonable inferences to be drawn therefrom, there is substantial evidence of the existence of every element of the offense charged." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89; see *People v. Rocha* (1971) 3 Cal.3d 893, 900.)

Here, the offense charged was assault with a firearm. An assault is " 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' " (*People v. Escobar* (1992) 11 Cal.App.4th 502, 505; § 240.) Section 245, subdivision (a)(2) provides that one is guilty of the offense of assault with a firearm when one "commits an assault upon the person of another with a firearm."

The evidence at trial established that, as Budkowski was getting into a car, Vega grabbed him by his jacket and attempted to pull him out. However, Budkowski was able to get into the car and he slammed the car door against Vega's arm several times. As Budkowski attempted to close the car door, Vega's other hand, in which he was holding a handgun, hit the car's window. Vega did not point the gun directly at Budkowski; he apparently did not have time to do so. Neither did he say anything to Budkowski. However, as Vega was trying to pull Budkowski from the car, he hit the car window several times with the gun. In view of this evidence it can be fairly concluded the trial court properly determined there was substantial evidence that Vega made an unlawful

attempt, while having the present ability to use the firearm to commit a violent injury on Budkowski. (See *People v. Escobar, supra*, 11 Cal.App.4th at p. 505.)

2. *The prosecutor's trial strategy did not deny Vega his right to a plea bargain or violate principles of Aranda/Bruton.*[3]

Vega contends he was denied a fair disposition of his case due to the prosecutor's abuse of the plea bargaining process and his use of his co-defendant's confession in violation of the principles of *Aranda/Bruton.*

A. *Plea bargain—the prosecutor's failure to make an offer*.

Prior to trial, Vega indicated he had given some thought to entering an "open plea." The trial court responded: "Well, at this point, just to recap some of the points and concerns, really, that the court noted before, this is kind of an exaggerated situation that demonstrates a need, in the way that I see things, on the part of the People to try both defendants together, because apparently, from what I understand, there is an issue as to identification [of] one of the defendants on a particular instance. [¶] And apparently this was a series of crimes committed during a relatively limited period of time, a crime spree over . . . a relatively short period of time on one evening. And given those characteristics, I can certainly understand and respect the People's desire to try both defendants together. There has been an effort on the part of actually both defendants to enter an open plea, and basically have the court sentence them as the court deems appropriate. That's an easier prospect with respect to Mr. Pineda, because, frankly, his record isn't as aggravated as is the case of Mr. Vega, who has two strike priors, and, of course, these are serious priors alleged." The trial court then noted that there had been some discussions regarding Pineda "offer[ing] to settle the case for eight years" and, since his exposure was approximately 11 years, the trial court indicated that eight years was reasonable. However, the People had made no offers. The trial court noted that the

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[3] *People v. Aranda* (1965) 63 Cal.2d 518, 530; *Bruton v. United States* (1968) 391 U.S. 123, 126.

People had requested that the matter proceed to trial "with both defendants present so [that] the jurors [could] actually see both of them."

The trial court indicated it would consider that Pineda had been "interested in settling the case in an early stage." The court then commented: "As far as Mr. Vega is concerned, it's extremely more problematic, because of his record, because of the allegation that he's the one who actually had the firearm during the commission of all of the offenses in which the two of them acted together. [¶] So the equities aren't quite as strong in his favor. I understand that he would like to settle the case, he would like to avoid a potential life sentence on the case, but I can't make any such guarantee. It really depends on what the facts of the case are. . . . You are in a much better position to assess them than I. [¶] So with that in mind, we will simply proceed with the trial." The trial court did, however, offer an alternative. It stated: "The alternative, of course, is that if [Vega] wishes to enter an open plea, he's welcome to do so[.] [B]oth defendants would do it under such an arrangement, and I would make no guarantee as to what [Vega] would receive, which means he may be, under the circumstances, pleading for a life sentence on the case. I don't know the facts."

Here, the prosecutor never offered Vega a plea agreement. Vega's assertion the prosecutor was required to make such an offer or risk committing misconduct is without merit. A prosecutor is not required to enter into plea negotiations (see § 1192.5) and review of the record indicates the prosecutor used neither reprehensible nor deceptive practices. (*People v. Haskett* (1982) 30 Cal.3d 841, 866 [" 'Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' "].) In this instance, it was the trial court which indicated it was willing to accept a plea, as long as the plea was "open." The court, however, would not commit to any particular sentence should Vega enter a plea. Pursuant to section 1192.5, a plea bargain must be "accepted by the prosecuting attorney and approved by the court." Given the questions regarding the identification of Vega and Pineda during the various

robberies and assaults, it cannot be said the prosecutor committed misconduct or abused the plea bargaining process when she determined the matter should go to trial.

B. *Use of Vega's co-defendant's confession—Aranda/Bruton.*

At trial, counsel and the court had a lengthy discussion regarding the admissibility of statements made by Pineda during an interview with a police officer. For example, with regard to at least one of the robberies, Pineda apparently told the officer, " 'I was there; I never got out; I drove away.' " Pineda also apparently stated: " 'And he already had the gun and not even – I – I don't know. I got intimidated, I don't know. I'm a lot younger than he is. We were in the car and he told me to get down [and] I got down. We ran over the ramp.' " Counsel for Vega asserted these statements improperly implicated Vega and were required to be deemed inadmissible under the *Aranda/Bruton* rule.

After further discussion, the prosecutor indicated the parties had come to an agreement regarding the testimony. The prosecutor stated: "I think that the court was right, that we probably should not introduce [evidence], where there is a strong implication of [Vega]. As a result, Your Honor, we are going to keep it that the—we'll talk about the Asian male, that [Pineda] was present, [that] he parked the car, initially said he didn't get out. And then, subsequently, said he did get out of the vehicle. [¶] And just keep it like that, where he brought his car, he was driving his Nissan Maxima, and he brought his car to the scene, he left in his car. And no mention of whether he got in or out, unless he actually got out." In addition, it was agreed that there would be "no mention of with or without a gun. No mention of the gun at all."

In *People v. Aranda, supra,* 63 Cal.2d at p. 530-531, the court indicated that "[w]hen the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against

nondeclarant codefendants once their identity is otherwise established. (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible." (Fn. omitted.)

In the present case, Vega's assertion that "counsel for co-defendant [Pineda] agreed to participate in the charade, which resulted in a joint trial at which the lack of defense of co-defendant and the prosecutor's use of co-defendant's confession combined to deny [Vega] a fair trial" is unsupported by the record. Initially, unlike the situation presented in *People v. Matola* (1968) 259 Cal.App.2d 686, on which Vega relies, defense counsel did not elicit from the officer who had interviewed Pineda any of the inculpatory evidence which the parties had agreed would be excluded. In addition, the trial was far from a charade. Both counsel for Vega and counsel for Pineda, as well as the trial court, agreed that, since Vega and Pineda were being tried together, it would be necessary to exclude certain evidence from Pineda's statement to police in order to comply with the dictates of *Aranda*. Unlike the co-defendant's counsel in *Matola*, Pineda's counsel abided by the agreement regarding the exclusion of certain portions of Pineda's statement. (*People v. Matola*, *supra*, at p. 689.)

Finally, Vega suffered no prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24; see *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.) The redaction of portions of Pineda's statement to police may even have benefitted Vega in that it made Pineda seem more culpable than he otherwise might have appeared.

3. *The trial court properly exercised its discretion when it sentenced Vega to 25 years to life plus 20 years in prison.*

A. *Sentencing proceedings*.

A jury found Vega guilty of four counts of robbery, with personal use of a firearm, two counts of attempted robbery, with personal use of a firearm, assault with a firearm and being a convicted felon in possession of a firearm. In addition, the trial court found true allegations Vega previously had been convicted of two counts of robbery.

At sentencing, Vega's counsel argued that Vega's prior strikes, robberies which occurred when Vega was only 17 years old[4] and in 1990, were remote in time and should not be considered. In addition, Vega's counsel argued that Vega's participation in the robbery which occurred in 1990 had been minimal; the case involved "three separate perpetrators against three gentlemen who were leaving a liquor store, and no weapons were used . . . ." With regard to the present crimes, Vega's counsel indicated that, although the charges were "very serious," the testimony indicated "a notable reluctance by Mr. Vega to use the gun." Vega's counsel asked the court to, under these circumstances, strike one of the strikes and sentence Vega to a determinant term.

The trial court indicated that, although it had some discretion, it believed "it would be an abuse of discretion to strike both strikes as to . . . all of the counts in [the] case, such that [Vega] would receive other than a life sentence." The court commented that "[t]he People have recommended [a life sentence], and [the court believed] the law command[ed] that that occur[], under the facts of this case." The trial court commented that the victims of Vega's crimes "will never be the same" and that if such a crime had been committed against Vega's mother, he would insist that the perpetrator be sentenced to the full extent of the law. The trial court then indicated that it was "not going to punish [Vega] to the fullest extent of the law."

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[4] Vega was 42 years old at the time of sentencing in the present matter.

The trial court granted Vega's motion to strike the prior convictions as to counts 2 through 8, but denied the motion as to count 1. With regard to factors in aggravation, the trial court indicated: "I should note for the record that they are, at least as the court sees it, as follows: The crimes involved great violence, great bodily harm, or [the] threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness. The defendant was armed with or used a weapon at the time of the commission of the crimes. The victims were particularly vulnerable. [¶] The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences will be imposed by the court. [¶] The manner in which the crimes were committed and carried out indicates planning, sophistication or professionalism. The defendant has engaged in violent conduct which indicates a serious danger to society, and specifically the two strike offenses, robberies, for which [he was] convicted in 1983 and 1990. [¶] The defendant's prior convictions as an adult, or sustained petitions in juvenile delinquency proceedings were numerous or [of] increasing seriousness. And it would be the latter as opposed to the former." The trial court continued, "I noticed that since his most recent strike conviction in 1990, he was convicted for [Health and Safety Code, section] 11351.5[, possession of cocaine base for sale,] and sentenced to state prison. So [he] didn't learn anything from [his] previous incarcerations, of which there [were] several." The court noted that, in addition, Vega had been arrested for driving under the influence, possession of methamphetamine and petty theft. Finally, the trial court indicated that Vega's "prior performance on probation or parole [had been] unsatisfactory. He was violated on parole on the 1990 conviction for [the] robbery."

With regard to factors in mitigation, the trial court indicated that, "frankly," it did not see any with the exception of the fact that it appeared Vega had "a wonderful family." The trial court noted, however, that that was not enough "to circumvent . . . what must be done in this case." The trial court indicated it had looked "very carefully at the factors in mitigation set forth in Rule of Court 4.423" and just did not see any that applied.

With regard to count 1, the trial court denied Vega's motion to strike a prior conviction and imposed a term of 25 years to life in prison. In addition, the trial court imposed a consecutive term of 10 years for the prior felony conviction found true pursuant to subdivision (b) of section 12022.53 and two consecutive five year terms for the serious felony convictions found true pursuant to section 667, subdivision (a). As to count 2, the trial court granted the motion to strike the prior convictions, subject to the validity of the sentence imposed for count 1, and imposed the high base term of four years, plus an additional 10 years for the prior convictions, then stayed the sentence pursuant to section 654, the stay to become permanent upon completion of the sentence imposed for count 1.

With regard to counts 3, 4, 5, 6 and 7, the trial court imposed upper term, concurrent sentences. As to count 8, the trial court sentenced Vega to the upper "term of 3 years, plus the high term of 10 years on the 12022.53, subdivision (b) allegation, for a total of 13 years," then stayed the sentence pursuant to section 654.

In total, the trial court sentenced Vega to a term of 25 years to life, plus 20 years in prison.

B. *Discussion*.

It has been determined that "in ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385[, subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161; see *People v. Superior Court (Romero*) (1996) 13 Cal.4th 497.)

A review of Vega's probation report indicates he began his criminal career in 1983 when he committed robbery with a firearm. He has been involved with law enforcement on a regular basis for a variety of crimes, including petty theft, robbery and narcotics offenses, ever since. His present crime "spree" involved four robberies, two attempted robberies and an assault, during each of which he personally used a firearm.

In view of the nature and circumstances of his present crimes, "and also in light of the particulars of his background, character, and prospects, which [are] not positive, [Vega] cannot be deemed outside the spirit of the Three Strikes law in any part, and hence may not be treated as though he had not previously been convicted of" prior serious or violent felonies. (*People v. Williams, supra*, 17 Cal.4th at pp. 162-163; see *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.) His contention that he "exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim" (Cal. Rules of Court, rule 4.423(a)(6)), is simply without merit. For example, Vega and his co-defendant took the not insignificant amount of $400 in cash, an "I-pod" and a cellular telephone from Jun. When robbing Linares, Garcia and Martinez, Vega pointed his gun at the three men with his arm outstretched. This could only have been taken as a threatening gesture. After pointing his gun at Stephenson, Vega took Stephenson's wallet and back pack. Positive comments from Vega's family could not outweigh his lengthy and serious criminal record. (Cf. *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 979.) The trial court properly exercised its discretion when it declined to strike Vega's prior felony convictions with regard to count 1.

4. *The trial court properly limited the comments of family and friends at Vega's sentencing hearing.*

After indicating that it had considered the arguments of counsel, the trial court stated: "The court has considered the arguments with respect to this issue and has basically determined what the appropriate sentence is, given the circumstances of this case. However, it is my understanding that there are members of the family who wish to

speak. [¶] And it would appear that there are many members of the family, I think that the count is somewhere up to perhaps 15 or so who would like to be heard. And as much as I would like to hear anything and everything that they would like to say, we do have, unfortunately, time constraints, and I do have other cases that I do have to handle here. So there has to be some reasonable amount of time that they would speak to the court on this issue. I understand, of course, how important it is. [¶] So my inclination is to restrict this to no more than five speakers, and it will be no more than two minutes apiece. And I would encourage anyone who wishes to be heard on this issue to be as brief as possible. I understand how pressing and emotional these circumstances are for you. Certainly that is not lost upon me. So[,] if there are any essential points that you would like to state, I ask that you do so quickly." The trial court then heard comments from five of Vega's relatives, including his brother, his nephews, his niece and his mother. Each of the speakers emphasized that Vega is a good man and that he had helped them in some way. After thanking the family members, the trial court heard argument from counsel.

In view of this record, it cannot be fairly argued that the trial court failed to consider the family members' comments. (Cf. *People v. Covino* (1980) 100 Cal.App.3d 660, 670-671 ["[T]he judge appears to have limited his consideration of circumstances in *mitigation* to those specified by rule 423 of the California Rules of Court. He failed to give consideration to the factors stated in the attorney's, employer's, and friend's letters. That appellant was a good worker, a kind person, and that he had a drinking problem could be considered as mitigating factors." (Italics in original.)].) The trial court must, however, "control all proceedings during the trial, and . . . limit the introduction of evidence and the argument of counsel to [the] relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) In addition to limiting the argument of counsel, the trial court is entitled to limit the comments of interested parties at sentencing. Here, although the trial court limited the family members' comments, it is clear from the record that he heard the

message Vega's relatives wished to send: that Vega is an essentially good man who has made some mistakes. Before imposing sentence, the trial court commented: "I just have to say right off the bat, Mr. Vega, that this is a very, very difficult position that you place me in, and it's not unusual. I am placed in this position on many occasions, on these very serious cases that I handle. It's part of the job; I understand that. And it's very difficult for me, though, emotionally, to perform this job, especially when I have such loving and wonderful people who are here on your behalf, very good people, who unfortunately and unavoidably will suffer the rest of their lives because of the things that you chose to do."

Review of the record indicates the trial court was properly informed of and considered mitigating factors and circumstances when it imposed Vega's sentence. There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.